**Laborers' International Union of North America, Local 931, AFL–CIO *and* Carl Bolander & Sons Co. and International Union of Operating Engineers, Local 139, AFL–CIO.** Case 30–CD–136

October 23, 1991

## DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed February 21, 1991, by the Employer, Carl Bolander & Sons Co., alleging that the Respondent, Laborers' International Union of North America, Local 931 (Laborers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 139, AFL–CIO (Operating Engineers). The hearing was held April 18, 1991, before Hearing Officer Suzanne M. Clement.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Company, a Minnesota corporation, is engaged in the business of construction at its facility in Appleton, Wisconsin, where it annually purchases and receives goods, materials, and services valued in excess of $50,000 from suppliers located outside the State of Wisconsin. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers' International Union of North America, Local 931, AFL–CIO and International Union of Operating Engineers, Local 139, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

#### II. THE DISPUTE

##### A. *Background and Facts of Dispute*

In June 1990, Carl Bolander & Sons Co. commenced work at the construction site of the Wastewater Treatment Plant for the city of Appleton, Wisconsin, where it is engaged in excavation, demolition, and pile-driving work. At the wastewater plant site, the Employer uses two ''rotary drills,'' which are also referred to as ''wagon drills'' or ''mechanized jackhammers.'' These drills are used to drill holes to insert explosives in the ground for the blasting and excavation of rock. The Employer, a signatory to collective-bargaining agreements with both Unions, has had a collective-bargaining relationship with the Operating Engineers since 1983, and the Laborers since 1990.

The Employer assigned work on the rotary drills to employees represented by the Laborers. On February 7, 1991, the Operating Engineers filed a grievance with the Employer contending that the Employer failed to assign that work to bargaining unit employees under the jurisdiction of the Operating Engineers' Local. In its grievance, the Operating Engineers demanded that it be paid the applicable wage and fringe benefit rates for all hours that the machines were in operation.

On February 7, 1991, the Laborers sent a letter to the Employer stating that the assignment of the work in question to employees represented by the Laborers was proper, and that the assignment should not be changed. Also, on that same day, the Wisconsin Laborers' District Council, in a letter to the Employer, stated that the assignment was proper and that it had no intention of relinquishing the rights to the operation of the rotary drills.

In a letter to the Employer dated February 20, 1991, the Wisconsin Laborers' District Council stated that a jurisdictional dispute had developed from the Operating Engineers' attempt to claim the drilling work at the wastewater plant site. In that letter, the Laborers advised the Employer that any attempt to change the assignment of work would cause ''an immediate labor dispute,'' and that the Employer's support in preventing a ''work stopage [sic]'' would be appreciated.

Calin Johnson, the Employer's project manager and superintendent, testified that he interpreted the Laborers' February 20, 1991 letter to mean that an assignment of the wagon drills to employees represented by the Operating Engineers would result in a strike or a work stoppage by the Laborers. Darrel Lee, the Laborers' president and business manager, testified that the threat of a work stoppage was valid, and a probable response by the Laborers in the event of an assignment of the work in question to employees represented by the Operating Engineers.

##### B. *Work in Dispute*

The disputed work involves the operation of rotary drills for the purpose of drilling holes in the ground for the blasting and excavation of rock at the construction site of the Wastewater Treatment Plant located in the city of Appleton, Wisconsin.

##### C. *Contentions of the Parties*

The Employer contends that the disputed work should be awarded to the employees represented by the

Laborers on the basis, inter alia, of its collective-bargaining agreement with the Laborers, company preference and past practice, economy and efficiency of operations, area and industry practice, and relative skills.

The Laborers contends that the employees it represents should be awarded the disputed work on the basis of its collective-bargaining agreement, prior joint board determinations, and area practice.

Although there is no evidence that the Operating Engineers officially disclaimed its interest in the disputed work, it now contends in its brief to the Board that the Board should decline to proceed to a determination in this case because it never requested an assignment of the disputed work. The Operating Engineers contends that there are no competing claims because its grievance, which requested the Employer's compliance with its contract, does not constitute a claim for the work. In the alternative, the Operating Engineers contends that, if a Board determination is warranted, employees represented by it should be awarded the disputed work on the basis of its collective-bargaining agreement, area practice, and prevailing wage rate determinations provided by the city of Appleton.

### D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have no agreed-upon method for the voluntary adjustment of the dispute.

As noted above, in response to the Operating Engineers' grievance alleging that the Employer's failure to assign the disputed work to employees represented by the Operating Engineers was a violation of its collective-bargaining agreement, the Laborers threatened an immediate labor dispute or work stoppage if the work was removed from its jurisdiction. There is no evidence to support the Operating Engineers' claim of collusion between the Employer and the Laborers. Accordingly, if there are competing claims to disputed work between rival employee groups, there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred.

The Operating Engineers contends that there are no competing claims because its grievance requests compliance with its collective-bargaining agreement, not the reassignment of the disputed work. We find no merit to this contention. This case presents a traditional 10(k) situation in which two unions have collective-bargaining agreements with the Employer and each union claims its contract covers the same work. See *Iron Workers Local 433 (Crescent Corp.)*, 277 NLRB 670, 673 (1985). In these circumstances, a claim to the work in dispute based on an asserted contractual right to the work does not remove the case from being a 10(k) dispute. Rather, the contractual claim constitutes a claim to the work and is one of the relevant factors for the Board's consideration in awarding that work. Otherwise, a union could consistently avoid the reach of Section 10(k) and Section 8(b)(4)(D) of the Act by couching its claim in terms of a contract claim for damages. Consequently, we conclude that there exists active competing claims to disputed work between rival groups of employees.

Based on our findings above, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that, as stipulated by the parties, there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

### E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

#### 1. Certifications and collective-bargaining agreements

There is no evidence that either the Laborers or the Operating Engineers has been certified as the exclusive collective-bargaining representative of any of the Employer's employees. The Employer, however, is signatory to collective-bargaining agreements with both parties.

The Laborers' most recent collective-bargaining agreement provides in Exhibit ''A'' that the Laborers' jurisdiction covers, among other things, drilling and blasting. This category includes:

> all work of drilling, jackhammering and blasting. Operation of all rock and concrete drills, including handling, carrying, laying out of hoses, steel handling, installation of all temporary lines and handling and laying of all blasting mats. All work in connection with blasting, handling and storage of explosives, carrying to point of blasting, loading holes, setting fuses, making primers and exploding charges. All securing of surfaces with wire mesh and any other material and setting of necessary bolts and rods to anchor same. All high scaling and other rock breaking and removal after

blast. Handling and laying of nets and other safety devices and signaling, flagging, road guarding.

Article IX of the current Operating Engineers' collective-bargaining agreement lists ''rotary drill operator and blaster'' as a classification.

Since both the Laborers' and Operating Engineers' collective-bargaining agreements arguably cover the disputed work, we find that this factor favors neither group of employees.

2. Company preference and past practice

The Employer prefers that the disputed work be awarded to employees represented by the Laborers. The Employer's vice president, James Timmons, testified that the Employer has historically used employees represented by the Laborers to operate the rotary drills, and that the Employer has never assigned the work to employees represented by the Operating Engineers. Accordingly, these factors favor an award of the disputed work to employees represented by the Laborers.

3. Area and industry practice

The Employer and the Laborers presented evidence that it was the area practice for rotary drilling work to be performed by employees represented by the Laborers. The Operating Engineers, however, also presented evidence that the work in the area has been performed by employees represented by the Operating Engineers. Under these circumstances, we find that the factor of area practice is inconclusive and does not favor an award of the disputed work to employees represented by either Union. The record does not establish any industry practice.[1]

4. Relative skills

The record indicates that employees represented by both the Laborers and the Operating Engineers possess the necessary skills to perform the disputed work. We, therefore, find that this factor does not favor an award of the disputed work to employees represented by either the Laborers or the Operating Engineers.

5. Economy and efficiency of operations

The Employer contends that it is more economical and efficient to assign the disputed work to employees represented by the Laborers. The Employer's project manager and superintendent, Calin Johnson, testified that the rotary drills are only in operation about 6 hours a day and that the disputed work involves more than just running the machine. He testified that the operation of the drills involves work such as adding the steel drills, loading the holes with blasting material, and setting the ''mats.'' Johnson testified further that while the laborers perform all of these tasks involved with the operation of the rotary drills, the operating engineers would not. Therefore, the Employer asserts that assigning the work to the operating engineers would be less economical and efficient because it would require the additional employment of a laborer to perform the other work involved with the operation of the rotary drills.

Employer Vice President Timmons also testified that assigning the disputed work to the laborers would be more economical and efficient because the laborers perform the excavation and shoveling work associated with operating the drills, and the operating engineers do not.

Accordingly, we find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by the Laborers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Carl Bolander & Sons Co. represented by Laborers' International Union of North America, Local 931, AFL–CIO are entitled to perform the work of operating the rotary drills used for the excavation of land at the Wastewater Treatment Plant for the city of Appleton, Wisconsin.

[1] The Laborers presented evidence of a joint board determination dated July 22, 1988, which held that the laborers were properly assigned work on the operation of an ''Ingersoll Rand L.M. 500 Hydraulic Drill'' in Modoc County, California. The evidence shows that the Ingersoll drill, although the same type of drill as the rotary drills involved in this case, is larger and has a cab attachment.